IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. ---------- 76-1481

DIGNA BALLENILLA-GONZALEZ,

Petitioner,

—v.—

IMMIGRATION and NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

DIGNA BALLENILLA-GONZALEZ,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on December 10, 1976, petition for rehearing with suggestion for rehearing en banc denied on January 27, 1977.

Opinions Below

The opinion of the United States Court of Appeals is set out in Appendix A, and is reported at 546 F.2d 515(2d Cir.1976).

The order of the United States Court of Appeals denying petitioner's petition for rehearing with suggestion for rehearing en banc is set out in Appendix B.

Jurisdiction

The judgment of the United States Court of Appeals was entered on December 10, 1976. A timely petition for rehearing with suggestion for rehearing en banc was denied on January 27, 1977. This petition for writ of certiorari was filed within ninety (90) days of the latter date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Does congressional policy as embodied in the recently enacted National Legal Services Corporation Act, 42 U.S.C. §§2996-2996(1) supercede provisions of the Immigration and Nationality Act, 8 U.S.C. §1252(b)(2) and §1362 which provide that an alien at a deportation hearing shall have the privilege of being represented by counsel but at no expense to the government?

2. Does deportation of an alien parent constitute the de facto deportation of a citizen minor child in violation of the citizenship clause of the fourteenth amendment to the United States Constitution?

Constitutional Provisions, Statutes and Regulations Involved

These provisions are reproduced in Appendix C:

1. U.S. Constitution, Amendment 14, §1.
2. 8 U.S.C. §1252(b)(2).
3. 8 U.S.C. §1362
4. 8 C.F.R. §242.16(a).

Statement of the Case

Petitioner, an indigent alien mother of a citizen child, was ordered deported for allegedly overstaying her student visa. The order was issued subsequent to a deportation hearing in which petitioner was unrepresented by counsel.

Petitioner, a citizen of the Dominican Republic, was granted a non-immigrant student visa for the school year 1973-1974 in order to attend a private religious high school in Puerto Rico. Petitioner sought to renew her visa on two separate occasions: once through an official at her school, and later through a physician treating her for complications relating to her pregnancy. This pregnancy resulted in the birth of a citizen son in September of 1974. On October 8, 1974, petitioner voluntarily went to the I.N.S. office to report the birth of her son and to apply for a change in immigration status.

This good faith action precipitated a November 18, 1974 deportation hearing. At the beginning of the deportation hearing petitioner was told that she had a right to retain counsel, but at no expense to the government. Petitioner was not told that as an indigent she could obtain pro bono legal services provided by grantees of the National Legal Services Corporation.

Despite being mislead about the availability of free counsel, petitioner never stated that she did not want a lawyer, only that she did not think that she needed one. Petitioner did not believe that she needed a lawyer because she did not understand the nature of the proceedings. Petitioner believed that the birth of her son would be the basis for the immigration law judge granting her immigrant status.

Instead, the immigration law judge ordered her deported and denied her a grant of voluntary departure. Only then did the immigration judge suggest that petitioner go to Waterbury Legal Services in order to secure legal counsel at no cost to represent her in an appeal.

Petitioner chose both to appeal the deportation order and to seek assistance from a federally funded legal services program. The Board of Immigration Appeals affirmed the judge's finding of deportability, but reversed the denial of voluntary departure provided that petitioner depart the United States within thirty (30) days of the order. Petitioner chose to exercise her statutory right to appeal the Board's order, thereby relinquishing her right to voluntary departure.

In her petition for review of the Board's order, she argued that I.N.S. had violated her constitutional and statutory right to counsel, that the decision was arbitrary and capricious, a denial of due process, and an abuse of discretion.

The United States Court of Appeals for the Second Circuit affirmed the Board's order. The Court concluded that petitioner had waived her right to counsel and was not prejudiced by the proceeding.

Reasons for Granting the Writ

I. This Court Should Resolve The Inconsistent Administration Of Two Important Federal Laws.

Despite the existence of a federally funded legal services program, the Immigration and Naturalization Service (I.N.S.) continues to inform indigent aliens subject to deportation hearings that they have the right to retain counsel so long as it is not at government expense. While this I.N.S. practice, codified in 8 C.F.R. §242.16(a), is consistent with the literal language of the immigration statute,[1/] it conflicts with the statutory mandate of the Legal Services Corporation Act of 1974, 42 U.S.C. §2996-2996(1). As a consequence, this practice undermines the original congressional purpose in establishing a statutory right to retain counsel in immigration proceedings.

Congress provided for the statutory right to retain counsel in a deportation proceeding when it approved the Immigration and Nationality Act of 1952. The right to retain counsel, along with other due process safeguards, was included in the 1952 Act to insure "fair administrative practice and procedure" in immigration proceedings, U.S. Code Cong. and Adm. News 82nd Cong., 2d Sess. 1679 (1952).

1/ 8 U.S.C. §§1252(b)(2) and 1362.

While the provision included a limitation that it not be at government expense, that provision was never meant to transform what Congress clearly intended to be a remedial provision into a punitive devise. Rather this language made clear that the Act would not provide for the delivery of legal services. The language suggests that Congress was unwilling to commit federal resources for attorneys to represent indigent aliens subject to deportation proceedings.

The lack of commitment dissolved a decade later when a national federally funded legal services program was created within the Office of Economic Opportunity. This commitment was finally institutionalized when Congress enacted the Legal Services Corporation Act of 1974. The Act establishes a federally funded legal services corporation charged with the statutory responsibility to provide "high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel", and to provide "equal access to the system of justice in our Nation for individuals who seek redress of grievances", 42 U.S.C.§2996(1)(2).

By establishing a separate federally funded independent corporation to provide this legal assistance, Congress recognized that "legal assistance for the poor should be more than a component of government programs aimed at reducing poverty".2/ Rather, Congress

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2/ Cramton, "Promise and Reality in Legal Services," 61 Cornell L.Rev. 670 (1976). Roger C. Cramton is Dean and Professor of Law at Cornell Law School and Chairman of the Board of Directors of the Legal Services Corporation.

predicated the Act on the "great principle that the poor are entitled to a competent lawyer in civil cases."3/ The Act's mandate is all-inclusive, reaching its umbrella to all of the poor.4/ Therefore, indigent aliens involved in civil administrative and judicial proceedings were also meant to be beneficiaries of this federally created program.

Unfortunately, few indigent aliens are aware of these services. Nor does I.N.S. inform them of the availability of these services at the time they become a party to a deportation proceeding. Rather, indigent aliens are led to believe just the opposite, i.e. that federally funded representation is either unavailable or proscribed by statute to them in a deportation proceeding.

Despite the creation of a national legal delivery system for the poor, the I.N.S. continues to ignore the congressional policy and mandate embodied in the 1974 Act. It continues to be the policy and practice of I.N.S. that commencing at every deportation hearing the immigration law judge advises the alien of the statutory right to be represented by retained counsel but at no expense to the government.5/ This facially

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3/ Id. at 671

4/ Id.

5/ This practice is codified in 8 C.F.R.§ 242.16(a) and was the case with petitioner as is apparent from the relevant portion of the hearing transcript:

> Q. You have a right to be represented here, if you wish, by an attorney or representative of your own choice and without expense to the United States government. (emphasis added)(See Appendix 3a, fn.2)

misleading statement is not coupled with an explanation that there is a federally funded legal services program that could provide representation to an indigent if the alien desires to retain counsel.6/ Unless the alien interprets this negative language as an affirmative grant, or unless the alien narrowly defines at no expense to the government to mean at no expense to I.N.S., the alien is led to believe that these services are unavailable.7/

Once informed of the "right" to retain counsel at no expense to the government, an alien is asked whether or not he desires to proceed with the hearing or to retain counsel, 8 C.F.R. §242.16(a). In effect, the alien is being asked whether or not he wishes to waive the right to counsel. While the right to be represented by counsel in a deportation proceeding may be waived, this waiver must be

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6/ Some immigration judges provide this information. See 20 INS 48 (1972) and Siabia-Fernandez v. Rosenberg 302 F.2d 139 (9th Cir. 1962). However, this is the exception to an otherwise codified practice. Such an ad hoc practice merely means that aliens rights will be determined by the generosity of the judge.

7/ It is unrealistic to think that an indigent alien, typically lacking English language skills, education and basic understanding of American legal institutions could make such subtle distinctions. Several commentators have written about these common characteristics. See Gordon, "Right to Counsel in Immigration Proceedings," 45 Minn. L.Rev. 875 (1961); Haney, "Deportation and the Right to Counsel," 11 Harv. Inter. L.J. 177 (1970); Nelville and Campos, "Statutory and Constitutional Problems in Immigration Law, 7 Colum. Human Rights L.Rev. 451 (1976).

knowing, intelligent and voluntary.8/

It is axiomatic that as long as an alien is not properly informed of this right, he cannot knowingly, intelligently or voluntarily waive this right. More specifically, the failure of an immigration judge to inform an indigent alien of the availability of pro bono legal services is a failure to inform the alien that he has a meaningful choice to make. Unless an indigent alien is informed that he has a real opportunity to retain counsel, a waiver of that right will be deprived of its requisite voluntariness. This was evident in petitioner's case. When she was told that she had a right to counsel at no expense to the government, she agreed to continue with the proceeding. However, once the immigration judge informed her that she could get free legal assistance from Waterbury Legal Services to press an appeal, petitioner retained counsel.10/ Unfortunately, the immigration judge waited to inform her of this opportunity until after he had concluded the deportation hearing in which he found her deportable.

The infirmity of petitioner's original alleged waiver is clear. At least one Circuit has agreed with this position. The Fifth Circuit has held that an alien had properly waived his right to counsel because the immigration judge had informed the alien of the availability of free legal services, Barthold

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8/ Valasquez Espinosa v. I.N.S., 404 F.2d 544, 546 (9th Cir. 1968); Yiu Fong Cheung v. I.N.S., 418 F.2d 460, 463 (D.C. Cir. 1969).

9/ Appendix 3a, fn. 2.

10/ Appendix 5a.

v. I.N.S., 517 F.2d 689 (5th Cir. 1975). Yet the Second Circuit improperly concluded that petitioner had waived her right to retain counsel.

If left to stand, the decision of the Second Circuit will provide a precedent for the continued I.N.S. practice of misleading aliens about their statutory right to retain counsel, and procedural rights of aliens will be subject to the practices of different immigration judges. As a consequence, the decision would undermine the original congressional intent in enacting a statutory right to counsel in order to provide for "fair administrative practice and procedure" in immigration proceedings. U.S.Code Cong. and Adm. News, supra.

Of equal importance, I.N.S. must be estopped from this practice if the explicit national mandate to provide "equal access to our system of justice" contained in the Legal Services Corporation Act is to be realized. For through this practice the government takes with one hand (I.N.S.) what it declares it gives with the other (Legal Services Corporation).

Petitioner asks this Court to grant this petition in order to resolve this conflict between the administration of two important federal laws by simply requiring I.N.S. to inform indigent aliens of the availability of free legal services at the same time that it informs them of their right to retain counsel.11/

11/ Petitioner is not asking the Court to decide the issue of whether or not an indigent alien has a constitutional right to appointed counsel in a deportation proceeding. This Court has declined to decide that question. See Aquilera-Enriquez v. I.N.S., 516 F.2d 565 (6th Cir. 1975), cert. denied, 96 S.Ct. 776

II. The Writ Should Be Granted In Order To Settle An Important Constitutional Question Left Unanswered In A Previous Decision Of This Court.

The Second Circuit's finding that petitioner had not been prejudiced by the lack of counsel at her deportation hearing was based on the court's assumption that petitioner was clearly deportable despite the birth of her citizen son. Petitioner submits that her deportation would result in the de facto deportation of her citizen infant in violation of the citizenship clause of the fourteenth amendment.12/

(1976); Martin-Mendosa v. I.N.S., 449 F.2d 918 (9th Cir.) cert. denied, 419 U.S. 1113 (1975); Henriques v. I.N.S., 465 F.2d 119 (2d Cir. 1972), cert. denied, 410 U.S. 968 (1973). Petitioner simply asks for clarification of I.N.S. practice relating to the provision for a statutory right to retain counsel in the Immigration Act itself, and whether that provision is superceded by the 1974 Legal Services Corporation Act.

Petitioner has filed a motion with this Court suggesting that the Office of the General Counsel, Legal Services Corporation be invited to file a brief amicus curiae expressing the views of the Corporation regarding the question presented here. The General Counsel's office has been served with a copy of the motion and this petition.

12/ Petitioner has standing to vindicate the constitutional rights of her son as she herself would be injured by their denial. Barrows v. Jackson, 346 U.S. 249, 255 (1953).

This important constitutional question of whether deportation of an alien parent is a de facto deportation of a citizen minor in violation of the constitution was left unanswered in this Court's decision of United States ex rel Hintopoulos v. Shaughnessy, 353 U.S. 72, 73 (1957). In Shaughnessy this Court found that the Board of Immigration Appeals had not abused its discretion in denying the suspension of the deportation of married aliens who had overstayed their visas. The married aliens argued that deportation would result in economic detriment to their minor citizen child. This Court's finding upholding the Board's denial of relief was based on its interpretation of §19c of the Immigration and Nationality Act of 1917. The Court did not reach the constitutional question of whether such a deportation violates the citizenship clause of the Fourteenth Amendment.

Despite the clearly limited nature of this decision, the government and various circuit courts have relied on Shaughnessy to conclude that the de facto deportation of citizen infants does not raise constitutional issues.13/ This misapplication of Shaughnessy conflicts with other Supreme Court decisions relating to citizenship and the authority of Congress and the Executive to deport citizens. At least one court has reached this conclusion, Acosta v. Gaffney, 413 F.Supp. 827 (D.N.J. 1976) appeal docketed No. 76-2094 (3rd Cir. July 13, 1976).

13/ Perdido v. I.N.S., 420 F.2d 1179 (5th Cir. 1969); Faustino v. I.N.S., 432 F.2d 429 (2d Cir.), cert denied 401 U.S. 921 (1970); Mendez v. Major, 340 F.2d 128 (8th Cir. 1965); Robles v. I.N.S., 510 F.2d 100 (10th Cir. 1973); Cervantes v. I.N.S., 510 F.2d 89 (10th Cir.1975).

The court in Acosta held that deportation of alien parents which results in the de facto deportation of their citizen child violates the citizenship clause of the fourteenth amendment, section 1. This holding relied on decisions of the Court that any child born within the United States is a citizen of the United States. Shaughnessy, supra, at 73; Perkins v. Elg 307 U.S. 325 (1939); United States v. Wong Kim Ark 169 U.S. 649 (1898). Supreme Court cases were also cited to conclude that neither Congress nor the Executive has the authority to deport a citizen. Mr. Justice Gray, writing for the Supreme Court in Won Kim Ark, noted:

> . . .citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization.
>
> . . .Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized by virtue of acts of Congress, a fortiori no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race can effect citizenship as acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship. (Emphasis added). Id. at 702.

The view that congressional or executive power could not affect, abridge, restrict or dilute citizenship was reaffirmed in Afroyim v. Rusk, 387 U.S. 253 (1967).

The Supreme Court should grant this petition to assure adherence to its prior holdings concerning congressional or executive power to affect citizenship. As long as the important constitutional question left unanswered in Shaughnessy remains unresolved, citizen infants of alien parents will be denied the full scope of the citizenship clause of the fourteenth amendment.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX A

APPENDIX A

No. 76-4130
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

DIGNA BALLENILLA-GONZALEZ,
Plaintiff,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

December 10, 1976

Before Kaufman, Chief Judge, and Moore and Mansfield, Circuit Judges.

Mansfield, Circuit Judge:

Petitioner overstayed her nonimmigrant student visa and was ordered deported by a Special Inquiry Officer of the Immigration and Naturalization Service("INS") on the basis of her admission of deportability. The Board of Immigration Appeals affirmed the finding that she had overstayed her visa, but granted her permission to depart voluntarily in lieu of deportation. Instead of leaving the country, petitioner brought this appeal, contending that the Special Inquiry Officer and the INS had deprived her of her constitutional and statutory rights to appeal by requiring that she choose between appeal and voluntary departure. Finding no merit to her contentions, we deny the petition for review.

Petitioner, a citizen of the Dominican Republic, entered Puerto Rico under a non-immigrant student visa for the purpose of attending tenth grade at Antillian College, a private religious high school in Puerto Rico. Her visa was due to expire May 30, 1974, when the school term ended. Over Christmas vacation, she went back to the Dominican Republic and became pregnant. Returning to Puerto Rico she did not go back to the Dominican Republic at the end of the school term but instead went to visit relatives in Waterbury, Connecticut, where her child was born on September 15, 1974.

On October 8, believing herself entitled to stay in the United States as a result of the birth of her child there, petitioner went to the INS to apply for permanent residence. She was referred to a deportation investigator who, after advising her that she had the right to remain silent and the right to have a lawyer present, asked her when she had entered the United States, when her visa had expired, and whether she had requested permission to remain beyond the original expiration date. Although her answers were somewhat confused,[1] they provided the INS

1/ The relevant portion of the record of petitioner's sworn statement from that interview reads as follows:

"Q. Where and when were you born and of what country are you a citizen?
A. May 5, 1950, at Santo Domingo, Dominican Republic, and I am a citizen of the Dominican Republic.
. . . .
Q. Where and when did you last enter

with the basis for its institution of deportation hearings, which were commenced by sending her an Order to Show Cause and Notice of Hearing written in English.

On November 18, 1974, petioner appeared at the hearing as scheduled. Neither she nor the Service was represented by counsel. The Special Inquiry Officer told her that the hearing was a deportation hearing and asked her whether she wanted a lawyer. After a certain amount of indecision, she decided that she would not need one.[2] Because it

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the United States?

A. January 8, 1974, at San Juan.

Q. At that time, you received permission to remain in the United States until May 30, 1974. Is that correct?

A. Yes.

Q. Did you apply for or receive permission from the United States Immigration to remain in the United States beyond May 30, 1974?

A. I did not ask, and I was pregnant, and then the doctor sent a letter saying that I should not travel and from here the doctor got an answer that it was all right."

2/ The relevant portion of the hearing transcript reads as follows:

Q. This hearing is to determine whether you shall be deported from the United States. At this hearing you will have an opportunity to show why you should not be deported. Do you understand?

A. Yes.

Q. You have a right to be represented here, if you wish, by an attorney or representative of your choice and without expense to the United States government. Do you wish to have a lawyer or representative here, or do you wish to speak without a lawyer or representative?

A. Will there be a problem? I don't

appeared that petitioner did not fully understand the Order to Show Cause, the Special Inquiry Officer had it explained to her in Spanish. Pleading to the allegations of the Order to Show Cause, petitioner then admitted that she was not a citizen, that she had stayed beyond the May 30, 1974 expiration date of her visa without INS authority, and that she was deportable.[3] Since under INS

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know.

Q. Well, as I told you, I'm going to decide whether you should be deported and you have an opportunity to show why you should not be deported or why you should be allowed to leave voluntarily or not deported, and at the end of the hearing I will decide what is to be done. It may be that you be deported, it may be that you get some relief from deportation and be found to be not deportable. Now, it's up to you as to whether you wish to have a representative here at the hearing. What do you wish to do?

A. Would it be better to have a lawyer?

Q. Well, I don't know what your case is. Now if you wish to have time to think it over we'll recess the hearing while you determine what you want to do.

A. I don't think there will be any problem. I don't think I need a lawyer."

3/ The relevant portion of the transcipt reads as follows:

"Q. Do you understand this charge that you are deportable because you were admitted to the United States as a student for a limited time and you have remained without authority for longer than that time?

regulations such admissions constitute a sufficient basis for a finding of deportability, the Special Inquiry Officer then turned to the question of whether petitioner would rather be deported or leave voluntarily. When she stated that she did not have the funds needed for voluntary departure, the Officer ordered her deported. He further informed her that she had the right to appeal to the Board and that if she wanted help with the appeal she could turn to the Waterbury Legal Aid Society, which she did.

A. I was going to ask the school for more time here and that they have to accept a letter and then they told me that it was alright.

Q. Do you understand the charge? We will come to a discussion about that in due course. Do you understand what the charge is in this paper?

A. Yes.

Q. The Order to Show Cause states first that you are not a citizen or national of the United States and second you are a native of the Dominican Republic and a citizen of the Dominican Republic. Are those statements true?

A. Yes.

Q. And fifth, you have remained in the United States beyond May 30, 1974 without authority of the United States Immigration and Nauturalization Service. Is that true?

A. Yes.

Q. It is charged that because of these facts you are subject to being deported under the provisions of Section 241(a)(2) of the Immigration and Nationality Act in that, after admission as a nonimmigrant under Section

With the help of the Legal Aid Society petitioner filed an affidavit with the Board on July 5, 1975, in which she stated that before leaving Puerto Rico for Waterbury, she had talked to one Monica de Lescay, who was in charge of immigration affairs for Antillian College, that de Lescay had said that she would take care of all of the forms necessary for an extension of petitioner's visa, and that petitioner was under the impression that everything had been taken care of by the school, so that she had permission to remain until September 1974. She further stated that while in Waterbury, where she received prenatal care, she was told that because of her pregnancy she would not be able to go back to the Dominican Republic in September, that the hospital would send a letter to the INS so stating, and that the letter had in fact been sent.[4] She was therefore under the

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101(a)(15) in said act you have remained in the United States for a longer time than permitted. As I have told you, more simply stated the charge is: you are deportable because you were admitted into the United States for a limited time as a student and you have remained without permission for longer than that time. Do you admit you are deportable on this charge or do you deny that you are deportable on this charge?

A. I admit it."

4/ The letter, showing that it had been mailed August 19, 1974, was attached to the affidavit.

impression that she had been granted permission to remain because of her inability to travel.

The affidavit further stated that as soon as her child was born, petitioner went to the INS to apply for permanent resident status, being under the impression that her American child gave her the right to do so, and stated that on November 18, 1974, she went to the INS, believing that the appointment was to fill out residency papers, and that she did not then believe she needed a lawyer because she "did not think that there was any problem with my staying". After the interrogation was completed, the affidavit stated, she went to the Waterbury Legal Aid Society, where she was told that the paper given to her by the INS was a deportation order and that the hearing had been a deportation hearing. Petitioner's affidavit stated that had she known she was in danger of being deported, she would have asked for a lawyer, and not being able to afford one, would have gotten help from the Waterbury Legal Aid Society.

On July 25, 1975, still waiting for the Board to hear her appeal, petitioner married an American citizen, who filed a petition to have her reclassified and for an immigrant visa. No action was taken on the spouse's petition prior to the Board's decision.[5]

5/ Petitioner's husband left for Puerto Rico before a hearing on his petition could be held. The current status of his petition is unclear.

The Board heard the appeal on September 24, 1975. Petitioner sought a rehearing before the immigration judge, this time with counsel. She argued that there remained unresolved questions as to whether she had submitted the appropriate documentation to allow her to stay beyond May 30, 1974, whether the INS had disposed of any such application properly, and whether the INS did not have affirmative duty to investigate the merits of her application for permanent resident status instead of starting deportation proceedings immediately. The Board denied a rehearing, holding that petitioner had not been deprived of the right to counsel at the hearing and that she had shown no prejudice from lack of counsel. Since petitioner had sufficient funds she was granted 30 days in which to depart voluntarily, but if she failed to do so the Board's order was to constitute an order to depart. After allowing the permission for voluntary departure to lapse, petitioner brought this appeal.

DISCUSSION

Turning first to petitioner's contention that the Board's order was arbitrary and capricious, §242.16 of the Code of Federal Regulations ("CFR"), Title 8 states that if, after the special inquiry officer advises a potential deportee of her rights and of the charges against her,[6] she, in response to

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6/ 8 C.F.R. §242.16(a) provides in relevant part:

"The special inquiry officer shall advise the respondent of his right to representation, at no expense to the Government,

questions, admits (as petitioner did here) the factual allegations of the order to show cause and admits deportability, and "the special inquiry officer is satisfied that no issues of law or fact remain," then the officer may determine that deportability has been established.[7] We do not believe that a

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by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires represntation; advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the government; place the respondent under oath; read the factual allegations and the charges in the order to show cause to the respondent and explain them in nontechnical language, and enter the order to show cause as an exhibit in the record. . . ."

7/ 8 C.F.R. §242.16(b) provides in relevant part:

"The special inquiry officer shall require the respondent to plead to the order to show cause by stating whether he admits or denies the factual allegations and his deportability under the charges contained therein. If the respondent admits the factual allegations and admits his deportability under the charges and the special inquiry officer is satisfied that no issues of law or fact remain, the special inquiry officer may determine that deportability as charged has been established by the admissions of the respondent."

decision based on such admissions is arbitrary or capricious under relevant statutory and regulatory standards.[8]

Petitioner argues, however, that because she has disavowed those pleadings by affidavit and stated facts which might bring into question the validity of those pleadings, the decision has nevertheless thereby been rendered arbitrary and capricious. As is clear from the relevant provisions of CFR, however, a motion for rehearing, whether presented to the Board, as it was here, or to the Special Inquiry Officer, must state the new facts to be proved at the reopened hearing.[9] Implicit in this requirement is the assumption that no such motion will be granted unless the facts alleged would be sufficient, if proved, to change the result. Here, even assuming all of the allegations and suppositions in petitioner's affidavit to be true, she still would not have had permission to remain in this country beyond the birth of her child on September 13, 1974, and thus still would have been deportable at the time of her hearing on November 18, 1974. Under the circumstances, we cannot take issue with the Board's refusal to order a rehearing on the basis of petitioner's new factual allegations. We therefore hold that the Special Inquiry Officer's finding of deport-

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8/ "[N]o decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence," 8 U.S.C. §1252(b)(4), or on "clear, unequivocal and convincing evidence." 8 C.F.R. §242.14(a).

9/ See 8 C.F.R §242.22; 8 C.F.R. §103.5; 8 C.F.R. §3.2.

ability, as affirmed by the Board, was neither arbitrary nor capricious.

Petitioner argues that in any event she is entitled to a rehearing because at the original hearing she was deprived of a constitutional right to appointed counsel, which she claims as a matter of equal protection and due process under the Fifth Amendment, and of her statutory right to counsel at no expense to the government pursuant to 8 U.S.C §1252(b)(2) and 8 C.F.R. §242.10.

To reach the question of the extent of petitioner's statutory and constitutional rights to counsel, however, we would have to find that she did not herself waive any such rights. This we cannot do. As required by 8 C.F.R. §242.16, the Special Inquiry Officer informed petitioner of her right to counsel at no expense to the government and asked her whether she wished to proceed with or without a lawyer. Petitioner was undecided, but believing that she could not be deported since she had given birth to an American child, ultimately decided that she would proceed without one. Thus she clearly waived any right to a lawyer, albeit on a mistaken impression of the law. We are not prepared to state that every waiver of a right to counsel given under a misapprehension of the state of the law must be upheld as valid. However, where (as here) a potential deportee, after obtaining qualified legal counsel, fails even to allege facts which could, had an attorney been available to aid in their proof, have changed the outcome of the hearing, such

a waiver will be deemed effective.[10] It is significant that her Legal Aid counsel, after reviewing the case, apparently concluded that no relevant new information could be adduced that might establish a right to remain in the United States. Being unable to show any prejudice by reason of her lack of counsel at the hearing, he accordingly did not move to reopen the hearing but chose instead to appeal to the Board, seeking relief based on mitigating circumstances and alleged denial of due process at the deportation hearing. For this reason we need not reach the constitutional and statutory questions petitioner attempts to raise.

Finally petitioner argues that the Board, by giving her only 30 days within which to

10/ The INS argues that this case should be governed by Henriques v. Immigration and Naturalization Service, 465 F.2d 119 (2d Cir. 1972) (per curiam), cert. denied, 410 U.S. 968 (1973), where we held that, absent a showing of prejudice, we would not reach the question of whether potential deportees have a constitutional right to counsel at government expense. Whether the same standard would apply in a case of a potential deportee's statutory right to retained counsel, see Castaneda-Delgado v. Immigration and Naturalization Service, 525 F.2d 1295 (7th Cir. 1975), we need not decide. What we hold here is much narrower: where a potential deportee has waived her right to retained counsel under a misapprehension of the law, has admitted the allegations of the INS and has not effectively disavowed her admissions, no rehearing with counsel is warranted.

depart voluntarily at no expense to the government, placed an unconstitutional burden upon her exercise of her statutory right to obtain judicial review, se 8 U.S.C. §1105(a), since a petition for review could not be prepared, briefed, heard and decided within that period and, if she departed the United States, she would no longer be entitled to judicial review,see Burrafato v. United States Department of State,523 F.2d 554 (2d Cir.) cert. denied, ----U.S.----(1975). The effect of the 30-day limitation, petitioner argues, was therefore to deny her due process by chilling her exercise of her right to appeal. We disagree.

Voluntary departure in lieu of deportation is not something which a deportee is entitled to as a matter of right. It rests within the Attorney General's sound discretion, see 8 U.S.C. §1254(e), 8 C.F.R. §244.1-2. Of course, this discretion should not be used by the Board to insulate its decisions and procedures from constitutional or statutory challenge. If an alien has a facially meritorious claim going to the validity of a deportation order, he or she should not be discouraged from seeking review by the offer of voluntary departure on terms that will evaporate if the appeal is pursued. The result would be to penalize an alien in the bona fide, non-frivolous exercise of a constitutional right.

On the other hand, our government should not be forced to tolerate the practice, all too frequently adopted by aliens once they become subject to a deportation order, of using the federal courts in a seemingly endless series of meritless or dilatory tactics designed to stall their departure from the

country as long as possible. As we have recently observed, see Acevedo v. I.N.S.,538 F.2d 918 (2d Cir. 1976), these efforts are frequently so frivolous as to constitute a misuse of civil process. In such cases, as we noted in Fan Wan Keung v. Immigration and Naturalization Service, 434 F.2d 301, 304-05 (2d Cir. 1970), quoting with approval the unreported decision of the Board of Immigration Appeals in Wong Ching Fui, dated August 21, 1969:

> "The purpose of authorizing voluntary departure in lieu of deportation is to effect the alien's prompt departure without further trouble to the Service. Both the aliens and the Service benefit thereby. But if the alien does not depart promptly, so that the Service becomes involved in further and costly procedures by his attempts to continue his illegal stay here, the original benefit to the Service is lost. And if, after years of delay, he is again rewarded with the opportunity for voluntary departure which he has previously spurned, what incentive is there for any alien similarly circumstanced to depart promptly when first given the opportunity?"

In Fan Wan Keung we held that the Service's refusal to grant a second permission voluntarily to depart after the alien had engaged in dilatory tactics to delay deportation was not an abuse of discretion.

Applying these principles here, the various interesting constitutional issues which petitioner would now like to raise are precluded by the record, which demonstrates that she received a fair hearing, waived her right to counsel and was not prejudiced by her waiver since the undisputed facts point to but one conclusion, that she was clearly deportable. At no time has she or her counsel ever made an offer to prove any facts indicating that she had a right to remain. Thus her appeal was unquestionably meritless. Furthermore, upon applying to the Board for the right of voluntary departure in lieu of deportation neither she nor her counsel expressed any intention to seek review. They did not seek from the Board an extension of her departure date, see 8 C.F.R §244.2. Nor did they follow the procedure of filing a petition for review within the 30-day period fixed by the Board for voluntary departure and requesting us for a stay of the Board's order pending appeal. These prodedures enable the Board or this court, in cases where a prima facie meritorious basis for appeal is shown, to permit its being pursued without prejudice to voluntary departure.

In short, instead of facing the undisputed facts of her situation, her counsel sought to raise constitutional issues without any meritorious factual basis. Such maneuvers do not entitle her as a matter of right to another chance at voluntary departure. On the other hand, it may be said in her favor that, despite the meritlessness of her cause, she has moved expeditiously and in apparent good faith in appealing from the Special Inquiry Officer to the Board and from the

Board to this court. Moreover, she is now married to an American citizen, her child is a U.S. citizen by virtue of its birth here, and her husband has filed a petition, presumably still pending, for her reclassification and for the issuance to her of an immigrant visa. In view of these circumstances, although we deny her application for reinstatement of her right to voluntary departure, we do so without prejudice to the Board's exercise of its authority, see 8 C.F.R. §244.4, to reinstate and extend the time within which she may depart voluntarily.

APPENDIX B

APPENDIX B

No. 76-4130
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT.

DIGNA BALLENILLA-GONZALEZ,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

January 27, 1977.

Before Kaufman, Chief Judge, and Mansfield and Moore, Circuit Judges.

A petition for a rehearing having been filed herein by counsel for the petitioner,

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
Clerk

No. 76-4130
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT.

DIGNA BALIENILIA-GONZALEZ,
Petitioner,
v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

January 27, 1977

Before Kaufman, Chief Judge, and
Mansfield and Moore, Circuit Judges.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the petitioner, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof it is

Ordered that said petition be and hereby is DENIED.

Irving R. Kaufman
Chief Judge

APPENDIX C

APPENDIX C

UNITED STATES CONSTITUTION
AMENDMENT 14
§1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

8 UNITED STATES CODE
§1252(b)(2):

Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations and not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requrements that:

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall shoose; . . .

8 UNITED STATES CODE
§1362:

Right to Counsel

In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, as he shall choose.

8 CODE OF FEDERAL REGULATIONS
§242.16(a):

Hearing

(a) Opening. The special inquiry officer shall advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires representation; advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf , and to cross-examine witnesses presented by the Government; place the respondent under oath; read the factual allegations and the charges in the order to show cause to the respondent and explain them in nontechnical language, and enter the order to show cause as an exhibit in the record.

Deportation hearings shall be open to the public except that the special inquiry officer may, in his discretion and for the purpose of protecting witnesses, respondents or the public interest, direct that the general public or particular individuals shall be excluded from the hearing in any specific case. Depending upon physical facilities, reasonable limitation may be placed upon the number in attendance at any one time, with priority being given to the press over the general public.